Supreme Court, U.S.
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88-1295

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Term

HAROLD ALLAN ANDREWS,

Petitioner,

VS.

JUDGE KENNETH LOVE, JUDGE
OF THE DISTRICT COURT
OF McCLAIN COUNTY, OKLAHOMA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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Purcell, Oklahoma 73080

IN THE

SUPREME COURT OF THE UNITED STATES

_____

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HAROLD ALLAN ANDREWS,	)
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Petitioner,	)
	)
vs.	)
	)
JUDGE KENNETH LOVE, JUDGE OF THE DISTRICT COURT OF McCLAIN COUNTY, OKLAHOMA,	)
	)
Respondent.	)

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered on the 27th day of October, 1988.

QUESTION PRESENTED

Did the decisions of the Courts of Oklahoma, ordering the Petitioner to submit to surgery on his body for the purpose of finding and retrieving a bullet for use as evidence violate the principles of the Fourth Amendment of the United States Constitution?

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Exhibit 1 - Order of the District Court of McClain County of September 8, 1988, requiring surgery.

Exhibit 2 - Opinion of the Court of Criminal Appeals of the State of Oklahoma affirming the Order of the District Court of McClain County of September 8, 1988.

TABLE OF AUTHORITIES

Cases	Page
Schmerber v. **California,** 384 U.S. 757	10
Winston v. **Lee,** 105 S.Ct. 1611	11

JURISDICTION

The Oklahoma Court of Criminal Appeals, the highest court in Oklahoma, having jurisdiction over criminal matters, entered its decision denying Petitioner's request that he not be forced to undergo surgery for removal of a bullet to provide evidence for the prosecution's case. The Court has jurisdiction because the State of Oklahoma has decided a Federal question in a way in conflict with a decision of this Court. Rules of the Supreme Court, Rule 17(c). This Court has jurisdiction because the Order of the Court of Criminal Appeals means Petitioner will have to undergo surgery unless the Court acts. Thus, an important federal question would escape review. This Court can review the final judgments and "decrees" of the highest state court having jurisdiction. 28 U.S.C. & 1257.

OPINIONS BELOW

The Order of September 8, 1988, of the District Court of McClain County, Oklahoma, ordering surgery, and the

Opinion, of October 27, 1988 of the Court of Criminal Appeals of the State of Oklahoma, affirming said Order by a two to one decision of the three man court, are attached as Exhibit 1 and Exhibit 2. The opinion of the Court of Criminal Appeals is published at 763 P2d 714. The District Court opinion is not published.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT IV

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Procedural History of the Case

The Petitioner was charged in the District Court of McClain County, Oklahoma with Murder in the First Degree under Title 21 Oklahoma Statutes Annotated Section 701. The State has filed a Bill of Particulars asking for the death penalty. The crime was stated to have

occurred on March 3, 1988 in McClain County, Oklahoma.

On July 11, and 12, 1988, Preliminary Hearing was had pursuant to Oklahoma Criminal Procedure. The Petitioner was bound over for trial.

Subsequently the State filed a Motion to Compel Surgery on the body of the Petitioner for the purpose of finding a bullet and removing it. This was to allegedly provide evidence that a bullet from the weapon of the victim was in the body of the Petitioner.

On September 8, 1988, after evidentiary hearing, the District Court of McClain County, Oklahoma ordered surgery for the removal of the bullet. (Exhibit 1). The Petitioner filed for a Writ of Prohibition with the Court of Criminal Appeals of the State of Oklahoma, the highest court of criminal review for Oklahoma.

After oral argument, that three man court, on October 27, 1988, affirmed the Order of the District by a two to one vote. A dissenting opinion was made. (Exhibit 2).

STATEMENT OF FACTS

On March 3, 1988, Hatten Lee Ledford was shot outside his home in southeastern McClain County, Oklahoma. He died slightly less than two days later. There were no eye witnesses to the shooting. However, at the preliminary hearing, a Rebecca Sue Dial testified that Mr. Ledford had

called her after being shot, and that she had gone to his house. That is response to her question Mr. Ledford stated that a John D. Miser had shot him (Tr p. 54) Mr. Ledford, further stated, that he had fired 16 shots with a 22 rifle at his assailant, and believed that he had struck him.

At the preliminary hearing the State introduced evidence of 22 cartridges around the house, some of which came from the Ledford gun; but other indicated fire from 2 other .22 firearms. (Tr p. 161)

Other physical evidence included lead fragments from the body of Mr. Ledford, a shotgun found by OSBI agents in a pond on the Ledford residence, and testimony identifying the lead from having come from the shotgun.

Petitioner was found, in a section line wounded from an apparent gunshot wound an approximate 750 feet from the Ledford residence. A pick-up, that had been in the possession of the Petitioner, was found within an approximate one-half mile of the Ledford residence.

An ambulance driver, James Wadley testified that the Petitioner stated that he was "poaching. The dogs started barking and they got scared." (Tr p. 80) Mr. Wadley further testified that Petitioner stated to his brother, "that he had been shot and knew who did it." (Tr p. 80)

These factors represent the entire connection of the Petitioner to this case.

On September 8, 1988, the District Court of McClain County, conducted an evidentiary hearing upon the State's Motion to Compel surgery. The State presented the testimony of Dr. Edward Lee M.D. of Purcell, McClain County, Oklahoma and Allen Salmon, an agent of the Oklahoma State Bureau of investigation to justify the compelled surgery. Dr. Lee testified that the bullet was imbedded one to one and a half centimeters in the subcutaneous tissue, within one half centimeters of the brachial artery. Dr. Lee attempted at this hearing to find the bullet by palpating the arm of the Petitioner, and failed to locate the bullet. Dr. Lee further testified that he would want a vascular surgeon to conduct the surgery. He further conceded that surgical removal of the bullet might cause nerve damage to the hand. Dr. Lee testified that in his opinion that the bullet could be removed by local anesthetic, and characterized the surgery as minor. All of Dr. Lee's testimony was qualified by the fact that he deferred to a specialist. At p. 26 of the Evidentiary hearing Transcript he testified that he could not testify as to someone else's opinion. Agent Salmon, when questioned

by the trial judge, as to whether "22 caliber projectiles ordinarily lend very well to ballistic examinations, admitted that he didn't know, and that he was not a firearms examiner. All of the State's evidence from Salmon was hearsay, as to what had been testified to at the preliminary hearing. However Agent Salmon did testify that the states testimony at the preliminary hearing indicated that the cartridges around the house of Mr. Ledford probably came from three different rifles. (Evidentiary Hearing Tr p. 26)

Based upon this hearing the trial judge in his Order of September 8, 1988 ordered that the bullet be surgically removed. However the Judge gave certain directives and reference is made to the Order for these. However, in essence, it required an X-ray to determine if the bullet had moved, and that if surgery would then significantly put the health, of the Petitioner at risk, there would be further hearings.

ARGUMENT

The case of **Schmerber v. California 384 U.S. 757, 86 S. CT 1826, 16 L. ed 2d. 908** approved the taking of a blood sample to establish intoxication. This case is cited as establishing an appropriate framework of analysis for cases involving search upon the body of an accused person. At 86 S. Ct. at 1836, the Court stated:

> We reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the State's (') minor intrusions into an individual's body under stringently limited circumstances in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

In the 1985 case of **Winston v. Lee 105 S. Ct. 1611** the State sought to have a bullet removed from the left chest of the Defendant to be used as evidence. The Court found this to be a more substantial intrusion. At page 1616 the Court stated:

> A compelled surgical intrusion into an individual's body for evidence, however implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime.

The Court further discussed the fact that the Fourth Amendment protects expectations of privacy, and the right of a citizen to be left alone. The Court found that the operation would intrude substantially on the Defendant's protected interests.

It is significant at page 1613 of the opinion that the Court discussed the fact that the medical evidence was subject to considerable dispute. The medical evidence in this case is wholly inadequate to support an Order for surgery. The testifying medical doctor stressed the need for a special-

ist's opinion, and the danger of nerve damage as a result of such surgery. As stated in the dissenting opinion, that considering the depth of the wound, and the cutting and probing involved, that the requested surgery would constitute a substantial intrusion upon the Petitioner's privacy interests and bodily integrity.

The Winston case pointed out the fact that the state had shown no compelling need for the bullet, was a factor in their decision, p. 1620.

In this case, in oral argument before the Court of Criminal Appeals, the state admitted only needing the bullet for purposes of strengthening their case. The probative value of the bullet is put into question by the fact, that there were three different weapons fired at the scene, but only one weapon tested.

Therefore Petitioner respectfully requests that a Writ of Certiorari issue to the Court of Criminal Appeals of the State of Oklahoma.

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CERTIFICATE OF SERVICE

The State of Oklahoma was notified of the proposed filing of this Petition by hand-delivering three copies to the Office of the District Attorney of McClain County, Purcell, Oklahoma, J. Tully McCoy on the 24th day of January, 1989.

Thomas G. Smith OBA #8414
Attorney for Petitioner

APPENDIX

IN THE

DISTRICT COURT IN AND FOR McCLAIN COUNTY,

STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff/Applicant,	)	
	)	
vs.	)	CASE NO. CRF-88-56
	)	
HAROLD ALLAN ANDREWS,	)	
	)	
Defendant/Respondent,	)	

ORDER ON THE STATE'S APPLICATION TO COMPEL SURGICAL REMOVAL OF BULLET

Now, on this 8th day of September, 1988, following the completion of the adversarial evidentiary hearing in this matter, held on the 24th day of August, 1988, the Defendant having appeared personally and with counsel, TOM SMITH, the State having appeared by District Attorney, J. TULLY McCOY and the Assistant District Attorney, RICHARD SITZMAN, the Court having heard oral testimony and argument, having reviewed any and all exhibits presented by the parties; the Court having taken the matter under advisement; the Court now enters the following findings of Facts and Conclusions of Law:

The State has presented sufficient probable cause to establish that the crime of MURDER IN THE FIRST DEGREE was committed by the Defendant as alleged in the Information filed herein; the State has submitted such evidence to establish probable cause to believe that a bullet fire by the victim at Defendant is now lodged in the Defendant's upper arm; including sufficient evidence that the victim's gun has been pre-tested and will lend itself to ballistics examination and comparison with the recovered bullet and whether said bullet was in fact fired from the victim's gun would be highly probative as to the guilt or innocence of the accused.

The Court is satisfied from the evidence presented that the risk of permanent injury to the Defendant or to the safety of his health in general is not great and will only involve minor surgery.

The Court further finds that the substance of Dr. Lee's testimony reflects that X rays were taken of the Defendant's arm at Purcell Municipal Hospital and that in his right upper arm there is a metal object cyclindrically shaped and apparently not fragmented. That it is lodged 1 to 1½ centimeters in the flesh of the upper arm. That only a local anesthetic would be necessary and that the utilization of a

general anesthetic to remove the bullet would not be necessary. That this would not be a life threatening situation to the Defendant to undergo such a procedure. The extent of the surgical intrusion upon the Defendant's protectice interests, privacy, upon his personal dignity and body integrity is not impermissibly significant.

That in the present case the community's legitimate interest to a fair and accurate determination of the guilt or innocence of the accused is great and there is a compelling need on the part of the State for the recovery of the aforesaid bullet.

That this case is one of great magnitude being a case of FIRST DEGREE MURDER and the State's case, although clear and convincing is primarily circumstantial in nature, as to the identity of the assailant. There is no eyewitness to the homicide, and the proof being sought is not available through any other known source of independant origin.

That the State's evidence as to the probative value of, and compelling need for, the aforesaid bullet, as well as the minor nature of the surgery required, is clear and convincing.

NOW, IT IS THEREBY ORDERED that the State's Motion to Compel should be and is hereby granted.

IT IS THE FURTHER ORDER OF THE COURT that said bullet shall be removed surgically from the upper arm of the Defendant pursuant to the following directives:

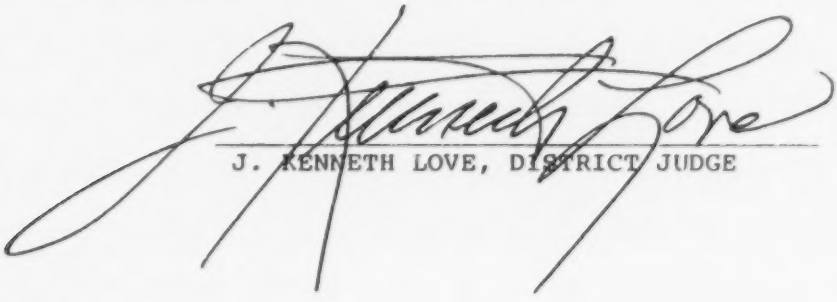
The Sheriff of McClain County is hereby directed and ordered to transport the Defendant to the Purcell Municipal Hospital or other similar medical facility at the direction of the Office of the District Attorney and shall maintain proper guard of the Defendant during the time that the Defendant is at said medical facility, including any time required for recovery. The Defendant should be admitted to the medical facility on an in-patient basis. Said bullet shall be surgically removed by a qualified licensed Cardiovascular Surgeon or Doctor of Medicine or Doctor of Osteopathy qualified to perform such procedures in accordance with accepted medical practices and procedures.

Prior to this procedure being conducted by a competent surgeon, it is ordered that X rays of said bullet be taken. If in the opinion of the treating physician said bullet has moved significantly from its previous location or that such surgery will now impose a significant risk to the health of the Defendant, then said surgey shall be delayed until the matter can be re-presented to the Court at a proper hearing.

Any physical evidence obtained as a result of said surgery shall immediately be turned over to an Agent of the Oklahoma State Bureau of Investigation for preservation.

IT IS FURTHER ORDERED that this procedure shall not be performed prior to the passage of ten (10) days of the date of this Order to allow the Defendant to announce his desire to appeal on the decision of this Court. That the surgery shall be performed under local anesthetic unless the Defendant should personally request and consent to the use of a general anesthetic. Should the Defendant file a written appeal with this Court, these criminal proceedings, and the execution of this Order, shall automatically be stayed pending a decision of the Court of Criminal Appeals of the State of Oklahoma in this matter and further Order of this Court.

SO ORDERED.



J. KENNETH LOVE, DISTRICT JUDGE

IN THE

COURT OF CRIMINAL APPEALS

OF THE STATE OF OKLAHOMA

HAROLD ANDREWS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. P-88-879
	)	
JUDGE KENNETH LOVE, JUDGE OF THE DISTRICT COURT OF McCLAIN COUNTY, OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION ORDER DENYING WRIT OF PROHIBITION AND STAYING FURTHER PROCEEDINGS

On October 20, 1988, the above petitioner filed his petition in this Court seeking issuance of the writ of prohibition against the Honorable Respondent to prohibit the enforcement of a certain order to remove a bullet from petitioner. The order was issued in McClain County District Court Case No. CRF-88-56. The application and petition was set for oral argument to be had in this Court at 10:00 a.m. on October 26. Mr. Thomas G. Smith of Purcell, Oklahoma, appeared for petitioner, and Mr. Tully McCoy, district attorney, and Mr. Rick Sitzman and Mr. Irby Taylor,

assistant district attorneys, appeared for respondent. This Court assumed jurisdiction. The Court had before it the record of the preliminary examination, and a transcript of the adversary hearing held by the district court on August 24, 1988, after which the district court order was entered on September 8, 1988, granting the State's Motion for surgical removal of a bullet from petitioner.

NOW THEREFORE, after considering the application and petition filed herein along with the briefs submitted by both sides, the transcript of the adversary hearing, and after weighing the factors outlined in **United States v. Crowder,** 543 F.2d 312 (D.C. Cir. 1977), and **Winston v. Lee,** 470 U.S. 756, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), and being sufficiently advised in the premises, this Court finds that the writ of prohibition should not issue.

IT IS THEREFORE THE ORDER OF THIS Court, that the writ shall not be granted, and the State may, within the guidelines set forth in the McClain County District Court Order of September 8, 1988 pursue the surgical removal of the bullet from petitioner. In accordance with the provisions of said order, additional x-rays shall be taken, and in the event the surgeon finds that the bullet has moved significantly from its previous location, or that such surgery will impose a significant risk to the health of the

petitioner, then the said surgery shall be delayed until the matter can be re-presented to the McClain County District Court at a proper hearing.

IT IS THE FURTHER ORDER OF THIS COURT, that further proceedings in McClain County Case No. CRF-88-56, shall be STAYED in order to permit petitioner to present this matter for consideration in the Federal Courts.

WITNESS OUR SIGNATURES AND THE SEAL OF THIS COURT, this 27th day of October, 1988.

TOM BRETT, PRESIDING JUDGE

HEZ J. BUSSEY, JUDGE (SPECIALLY CONCURRING)

ED PARKS, JUDGE (DISSENTS)

ATTEST:

Clerk

BUSSEY, J., specially concurring:

It is well settled that the Fourth Amendment protects an individual's reasonable expectation of privacy. **See Katz v. United States,** 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Assuredly, I do not suggest that a compelled surgical intrusion into an individual's body for evidence does not implicate expections of privacy. However, the Fourth Amendment neither forbids nor permits all such intrusions; rather, the Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. **Schmerber v. California,** 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). When this standard is applied to the facts of this case, I believe the removal of the bullet is reasonable and proper, and the district court's order should be sustained.

The State's case is admittedly circumstantial. On March 3, 1988, Hatten Lee Ledford was fatally wounded in his home. There were no eyewitnesses. Mrs. J. R. Dial has

testified that she talked to Ledford as he lay on the floor dying, and he claimed that John D. Miser, a neighbor, had shot him. Ledford also stated to Mrs. Dial that he had returned fire against his attacker. A .22 rifle with spent shell casings was found lying next to Ledford's body.

Within one hour of the shooting, petitioner was found approximately a quarter of a mile from Ledford's house. Petitioner had been shot in the chest, and it was determined that a bullet was lodged in his arm. Subsequent investigation uncovered a .20 gauge shotgun in a pond approximately three-tenths of a mile from Ledford's house.

Dr. Edward Lee testified that the removal of the bullet from petitioner's arm can be accomplished with routine, minor surgical procedures, under local anesthetic, without any significant danger to the health or safety of the petitioner. The bullet is located in the fleshy part of the arm, approximately one and a half centimeters deep, near a major artery, but Dr. Lee testified that if done properly, the bullet can be removed without injury to the vessel. Dr. Lee stated that there is a 99.9 percent chance that the surgery would be an uncomplicated, minor procedure that poses no risk of long-term injury to the petitioner. Finally, the sought-after bullet does not appear to be fragmented or

corroded, and OSBI agent Allen Selman testified that Ledford's gun leaves identifying markings on the bullets that it fires.

In **United States v. Crowder,** 543 F. 2d 312 (D.C. Cir. 1976), **cert. denied,** 429 U.S. 1062 (1977), the court held that an operation performed under a local anesthetic, removing a bullet-like object located immediately under the skin in Crowder's forearm, was a reasonable search under the Fourth Amendment. In support of its decision, the court provided the following factors:

> 1) the evidence sought was relevant, could have been obtained in no other way, and there was probable cause to believe that the operation would produce it;
>
> 2) the operation was minor, was performed by a skilled surgeon, and every possible precaution was taken to guard against any surgical complications, so that the risk of permanent injury was minimal;
>
> 3) before the operation was performed, the district court held an adversary hearing at which the defendant appeared with counsel; and
>
> 4) thereafter and before the operation was performed the defendant was afforded an opportunity for appellate review. **Id.** at 316.

Applying these factors to the present case, it is clear that the evidence sought is relevant, can be obtained in no other way, and there is probable cause to believe that the operation would produce it. The operation is minor and

would be performed by a skilled surgeon under a local anesthetic. The risk of permanent injury is minimal, and further x-rays would be taken to ensure petitioner's safety. Finally, petitioner has been afforded both an adversary hearing and appellate review.

The Supreme Court addressed surgical intrusion in **Winston v. Lee,** 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985). **Lee** involved a surgical procedure under a general anesthetic for the removal of a bullet lodged in the muscular tissue of the chest, approximately three centimeters deep. In medical terms, it seems fairly obvious that the surgery contemplated in **Lee** entailed a greater risk of permanent injury than the surgery involved in **Crowder** or the present case.

In **Lee,** the Supreme Court restated the procedural requirements of **Schmerber, supra,** that being, probable cause and a search warrant. The court then established a balancing test weighing the extent to which the procedure may threaten the individual's safety or health, the extent of intrusion upon the individual's dignity interests in personal privacy and bodily integrity, and the community's interest in fairly and accurately determining guilt or innocence. **Id.** 470 U.S. at 758-60.

In affirming the lower court's denial of the surgery, the court pointed to the conflicting testimony regarding the medical risks of the surgery, and of particular concern was the use of the general anesthetic. The court also expressed doubt about the probative value of the bullet due to corrosion while inside Lee's body, and the availability of alternative evidence against Lee. **Id.** 470 U.S. 766 n.10.

Applying these factors to the present case, I find the following: (1) probably cause is established by the petitioner's close proximity to the scene of the homicide; (2) the procedure is not life-threatening; (3) the surgery would be performed under local anesthetic; (4) the community has a strong interest in determining petitioner's guilt or innocence to the charge of murder; (5) the bullet is still in tact inside petitioner's arm; and (6) there is no other alternative evidence.

The Supreme Court declared in **Lee** that the reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach. **Id.** 470 U.S. at 760. Obviously, reasonableness is a matter of degree, and I do not suggest that a court may order any challenged operation in any given case. However, this is a case of murder in the first degree. If we were to disallow bodily intrusion based on the

presence of any risk, no matter how slight, then no such operation could ever be authorized by a court. I do not believe this is or should be the law.

Based on the totality of the circumstances in this case, and applying the balancing standards above, I find that the State has demonstrated a compelling need for the bullet, with minimal risk to the petitioner, and the district court's order should be affirmed.

HAROLD ANDREWS v. THE STATE OF OKLAHOMA
(Brett Order) (P-88-879) (10-26-88)

PARKS, Judge, Dissenting:

I vigorously disagree with the majority's denial of petitioner's application for a writ or prohibition to prevent enforcement of the trial court's order compelling surgical removal of a bullet from petitioner.

The United States Supreme Court, in holding that a State may compel a defendant suspected of drunk driving to submit to a blood test, without violation of the Fourth Amendment's prohibition against unreasonable searches and seizures, warned:

> [W]e reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States['] minor intrusions into an individual's body

> under stringently limited circumstances in no way indicates that it permits more substantial intrusions, or intrusions under other conditons.

Schmerber v. California, 384 U.S. 757, 772,86 S.Ct. 1826, 1836, 16 L.Ed.2d 908 (1966). Subsequently, relying heavily upon **Schmerber,** the Court held that compelling a defendant suspected of attempting to commit an armed robbery to undergo surgical removal of a bullet located under his collarbone was "unreasonable" under the Fourth Amendment, and thus prohibited. **Winston v. Lee,** 470 U.S. 753, 755, 105 S.Ct. 1611, 1614, 84 L.Ed.2d 662 (1985). "A compelled surgical intrusion into an individual's body for evidence ... implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." **Id.** at 759, 105 S.Ct. at 1616. The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State, values which are basic to a free society. **Id.** at 760, 105 S.Ct. at 1616 (citations omitted). Admittedly, "[t]he reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interest in privacy and security are weighed against society's interests in conducting the procedure." **Id.** at 760, 105 S.Ct. at 1616.

In **Winston,** the Court balanced the following factors: (1) the existence of probable cause; (2) the extent of threat to the safety or health of the individual; (3) the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity; and (4) the community's interest in fairly and accurately determining guilt or innocence. **Id.** at 760-62, 105 S.Ct. 1616-18. When the State seeks to justify an intrusion into an individual's body, it must "demonstrate a compelling need." **Id.** at 766, 105 S.Ct. at 1620. Because such intrusion is "upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable.'" **Id.** at 767, 105 S.Ct. at 1620.

Assuming **arguendo** the State had probably cause to conduct the search, I believe the State has failed to substantially justify the search on the remaining three factors. The State presented the medical testimony of Dr. Edward Lee, M.D., and the testimony of OSBI Agent Allen Selman to meet its burden of justifying the requested compelled surgery. First, with regard to the threat to petitioner's health, Dr. Lee testified that because the bullet in petitioner's upper arm was imbedded one to one and a

half centimeters in the subcutaneous tissue, within half a centifmeter of the brachial artery, he would want a vascular surgeon, a specialist, to conduct the surgery. At the evidentiary hearing, Dr. Lee was unable to locate the bullet by exterior physical examination. Dr. Lee also conceded that surgical removal of the bullet might cause nerve damage to the hand. Dr. Lee opined a specialist could remove the bullet under local anesthetic, that nerve damage was not a "major consideration," and that such surgery was "minor." "The question whether the surgery is to be characterized in medical terms as 'major' or 'minor' is not controlling." **Winston,** 470 U.S. at 764 n.8, 105 S.Ct. at 1618 n.8. However, it is questionable whether Dr. Lee was in a position to properly assess the risks of the operation since he would not do the surgery himself, but recommended a specialist. When confronted with this question, Dr. Lee admitted "I cannot testify for someone else's opinion." (Evid. Hg. Tr. 26)

Clearly, considering the depth of the wound, the extent of cutting and probing required, and the close proximity to the brachial artery, the requested surgery would constitute a substantial intrusion upon petitioner's privacy interests and bodily integrity. Turning to whether the State has

demonstrated a compelling need for the evidence, I would point out that during oral argument before this Court Assistant District Attorney Richard Sitzman, speaking on behalf of District Attorney Tully McCoy, candidly stated the case would not be dismissed if they were not allowed to obtain the bullet, thus indicating their belief that their case against petitioner was strong enough to survive a motion for a directed verdict at trial. Mr. Sitzman further stated the State's need for the bullet was couched in terms of "strengthening" his case against petitioner, and not making or breaking it. Certainly, the foregoing makes respondents' "assertions of a compelling need for the bullet ... hardly persuasive." **Winston,** 470 U.S. at 765, 105 S.Ct. at 1619. Further, the probative value of the bullet is questonable. When asked by the trial judge, "[d]o .22 caliber projectiles ordinarily lend very well to ballistic examinations?," OSBI Agent Allen Selman testified, "I'm not aware. I'm not a firearms examiner myself." (Evid. Hg. Tr. 52) The State's evidence as to the possibilities of conducting a ballistics examination was based purely on the hearsay testimony of Agent Selman, who was allowed to testify that an OSBI Firearms Examiner had test fired the victim's .22 rifle and determined that bullets fired from it

could be identifiable. Moreover, Agent Selman testified he was aware of a State witness' testimony at preliminary hearing that the .22 caliber cartridges found at the scene of the crime probably came from three separate rifles. (Evid. Hg. Tr. 51) Yet, only one rifle was tested for purposes of ballistics comparison.

In conclusion, in weighing the various factors enunciated in **Winston,** on this record, the State has failed to demonstrate a compelling need for the bullet, which may or may not be "useful" in its prosecution of petitioner. I believe that in these circumstances the compelled surgery would constitute an unreasonable search and seizure under the Fourth Amendment. **Winston,** 470 U.S. at 766-67, 105 S.Ct. 1620. Accordingly, I dissent.